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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. MARK ANTHONY FREGIA, Defendant and Appellant.	A121158 (Contra Costa County Super. Ct. No. 05-041430-0)

Defendant Mark Fregia poured gasoline on his former girlfriend in a car and lit her on fire, which caused the car to ignite burning to death two-year old and six-year old children seated in the car. A jury convicted defendant of the first degree felony murder of the two children and of lesser offenses committed against their mother. The trial court sentenced him to two terms of life without possibility of parole on the murder convictions, and a determinate term of 59 years four months on the lesser offenses and enhancements. Defendant contends there was *Wheeler/Batson* error regarding one African-American prospective juror.[1] He also contends the prosecutor committed prejudicial misconduct during closing argument to the jury. We reject defendant's contentions and affirm.

[1] (*Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).)

I. FACTS

A. Overview

The victims in this case are defendant's former girlfriend, Erin Weaver; two-year-old Daelin, the couple's son; and six–year-old Devlin, Weaver's daughter from a prior relationship. In the summer of 2002, Ms. Weaver left defendant because of his physical abuse. About 18 months later, in December 2003, defendant pleaded with Ms. Weaver to go with him and the children to a toy store to buy Christmas presents. Defendant drove, Weaver rode in the passenger seat, and the children rode in the back seat.

Defendant deviated from the route to the toy store and refused Weaver's demands to let her out of the car, thus converting the trip into a kidnapping. Defendant produced a soda bottle full of gasoline, poured it on Ms.Weaver, and set her on fire. The car ignited and crashed. Defendant escaped unharmed. Weaver survived, but was horribly burned. The two children were trapped in the car and died.

This case was tried as a death penalty case. In closing argument at the guilt phase, defendant *conceded* that there was "more than adequate" evidence to convict him of the first degree felony murders of Daelin and Devlin.[2] Defendant also conceded that he "should spend the rest of his life in prison." His defense was that he did not intend to burn Weaver, but only to frighten her, and that the gasoline ignited by accident. Apparently, defendant wanted to avoid conviction for the attempted murder or attempted voluntary manslaughter of Weaver, and of other offenses and enhancements that required a specific intent.

B. The Facts of the Offenses

Under applicable standards of appellate review, we must view the facts in the light most favorable to the judgment of conviction, and presume in support of the judgment the existence of every fact which the jury could reasonably find from the evidence. (*People v. Barnes* (1986) 42 Cal.3d 284, 303; *People v. Neufer* (1994) 30 Cal.App.4th 244, 247.)

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[2] A murder committed during the perpetration of a kidnapping is first degree murder. (Pen. Code, § 189.)

Weaver met defendant about four years before the offenses, presumably in 1999 or early 2000, when the two participated in a drug treatment program in Vallejo. Weaver and defendant became romantically involved.

Weaver and defendant moved in together, and Weaver became pregnant with Daelin. During the pregnancy defendant used crack cocaine and became emotionally abusive toward Weaver. After Daelin was born, defendant began to physically abuse Weaver, hitting her and giving her black eyes. After a number of incidents of physical abuse while defendant was under the influence of drugs, Weaver decided to leave defendant. She called the police and had defendant arrested for being under the influence, so she could move out "while he wasn't there, because I knew he wouldn't let me leave."[3]

In July 2002, Weaver left defendant. She went to live with Devlin and Daelin in her sister's apartment. In August 2002, defendant came to the apartment and entered through a sliding glass door while Weaver was being intimate with another man. Defendant became enraged, choked Weaver, and dragged her out of the apartment. Defendant was arrested and charges were filed. Defendant was released on bail.

In the fall of 2003, Weaver moved with the children to Redding. Defendant accused Weaver of seeing another man, and "would get mad about it."

In mid-December 2003, defendant persuaded Weaver to bring the children to the Bay Area to visit him. Weaver and the children stayed in a hotel. Weaver did not allow defendant to stay with her and the children while they were in the Bay Area, but she did allow Daelin to spend a few nights with defendant.

Daelin spent the night with defendant on December 17, 2003. On the morning of the 18th, defendant phoned Weaver to arrange to bring Daelin back to her. Defendant asked if he could take Weaver and the children to the Vallejo Toys R Us to buy Christmas presents. Weaver refused. Defendant called back several times and persistently asked her to go toy shopping. Weaver eventually agreed, but stressed that

[3] The People presented evidence of numerous incidents of domestic violence that defendant committed on Weaver.

she and defendant were no longer involved and she was seeing a new boyfriend. Weaver agreed to meet defendant near her boyfriend's house.

Defendant arrived at the meeting place with Daelin in his car. He appeared to be "coming down" from a crack cocaine binge. Weaver and Devlin got into the car. Weaver sat in the front passenger seat. Daelin was in the back seat behind Weaver. Devlin was in the back seat behind defendant.

Defendant drove in the opposite direction from the Vallejo toy store. Weaver started screaming at defendant, and repeatedly demanded to be let out of the car. Defendant did not respond. He continued to drive, and got onto Interstate 80. He drove over the bridge towards Contra Costa County.

As defendant drove, he asked Devlin to hand him a 20-ounce soda bottle that was under his seat. Devlin said, "Okay, Daddy," reached under the driver's seat, and retrieved the bottle and handed it to him. The bottle contained gasoline. Defendant poured gasoline onto Weaver's head and body, then displayed two cigarette lighters. Near the Appian Way exit, defendant flicked one of the lighters right in front of Weaver, igniting the gasoline. Weaver caught fire, and grabbed the steering wheel to crash the car so she could get out.

The car went up the Appian Way off-ramp and slowed. Weaver jumped out and rolled on the ground to extinguish the flames. She returned to the car to try to save her children, but was unable to do so—presumably because the heat from the fire was too intense. Defendant did not try to help her and did not try to save the children.

Several motorists saw the crash and stopped. They saw Weaver on fire and screaming about her children. They did not see defendant show any concern for Weaver or the children. Defendant did not ask the motorists to help the victims, and indeed did very little, but repeatedly—and nonchalantly—asked for a ride. Defendant carjacked one of the motorists' vehicles and sped away.

Pinole Police Officer Brian Tanner responded to the fire scene. He described "one of the most difficult and unbelievable" crime scenes he had seen in eight and a half years of law enforcement. Much of Weaver's skin hung loose on her body and her hair was

burned to her scalp. She told Tanner defendant had burned her, and she kept screaming frantically "my babies!" It took Tanner "a good 15 seconds" to settle himself before he could begin to function.[4] The witnesses and responding ambulance personnel were extremely upset.

Forensic analysis showed that the fire started in the car's front passenger seat, and had been accelerated with as much as two liters of gasoline. There were traces of gasoline on defendant's and Weaver's clothing.

Autopsies of Devlin and Daelin showed that they had suffered massive burns; their bodies were badly charred. They died from smoke inhalation and carbon dioxide toxicity. In the pathologist's opinion, the children were alive for some time, at least enough time to take a few breaths, while trapped in the car during the fire—their interior airways were sooty and heat damaged, indicating they had inhaled smoke and very hot air.[5]

Weaver suffered second and third degree burns over 85 percent of her body. She spent nine months in the hospital. By the time of trial, she had undergone about 70 surgical procedures and was far from healed.

Defendant testified at length. Because of the concession regarding the murder convictions, and the nature of the issues raised on appeal, we need not discuss his testimony in any detail.[6] It suffices for our purposes to note that—as defendant's appellate counsel essentially concedes, and as defendant explicitly conceded below—defendant admitted on the witness stand that he kidnapped Weaver and the children, and thus admitted his guilt of first degree felony murder. (See fn. 2, *ante*.) He

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[4] Tanner testified: "[I] wish I never had to experience it. . . . [¶] [T]o hear a mother screaming 'my babies' and to look over her right shoulder and see the vehicle fully engulfed in flames, and to know that there's two children in the car [and to see the stopped motorists] overcome with emotion . . . ."

[5] An expert opined that there was a "tremendous amount of heat in the rear passenger space" of the car.

[6] Likewise, we need not discuss the testimony of defendant's expert witnesses, most of whom were psychiatrists or psychologists.

admitted to dousing Weaver with gasoline and holding the lighter, but claimed he only wanted to "terrorize" Weaver and did not intend to ignite the gasoline or to kill her. He claimed he held the lighter a foot from her to keep her from leaving the car, but the gasoline then ignited—presumably by accident.

The jury convicted defendant of the murders of Daelin and Devlin (Pen. Code, § 187),[7] with special circumstances for multiple murder (§ 190.2, subd. (a)(3)), kidnapping (§ 190.2, subd. (a)(17)(B)), and mayhem (§ 190.2, subd. (a)(17)(J)), counts 1 and 2; the attempted voluntary manslaughter of Weaver (§§ 192, subd. (a), 664), as a lesser included offense of the charged offense of attempted murder, with an enhancement for great bodily injury (§ 12022.7, subd. (a)), count 3; arson (§ 451, subd. (a)), with enhancements for great bodily injury (§ 451.1, subd. (a)(3)) and use of an accelerant (§ 451.1, subd. (a)(5)), count 4; aggravated mayhem of Weaver (§ 205), count 5; kidnapping (§ 207, subd. (a)), count 6; and carjacking (§ 215, subd. (a)), count 7.

After the penalty phase, the jury declined to impose the death penalty and returned verdicts of life without the possibility of parole on counts 1 and 2. The trial court sentenced defendant in accordance with those verdicts, and imposed an additional determinate term of 59 years four months on the remaining convictions and enhancements.

II. DISCUSSION

Defendant, who is African-American, raises a *Wheeler/Batson* issue with regard to one African-American prospective juror.[8] Defendant also contends the prosecutor committed prejudicial misconduct at closing argument to the jury in the guilt phase. We reject defendant's contentions for the reasons set forth below.

A. Alleged Wheeler *Error*

An attorney may not use a peremptory challenge to exclude a prospective juror based on race. Such exclusion violates the defendant's rights to equal protection of the

[7] Statutory citations are to the Penal Code.

[8] For stylistic simplicity, we henceforth refer to "*Wheeler/Batson*" as "*Wheeler*."

laws and to a trial by a fair and impartial jury, guaranteed by the United States Constitution, as well as the right to a jury drawn from a representative cross-section of the community guaranteed by the California Constitution. (*Batson, supra*, 476 U.S. at p. 89; *People v. Lenix* (2008) 44 Cal.4th 602, 612 (*Lenix*); *Wheeler, supra,* 22 Cal.3d at pp. 276−277.)

A peremptory challenge is presumed to have been properly exercised—but the presumption is rebuttable. The burden is on the party opposing the challenge to show that it was impermissibly exercised in discrimination against a cognizable group, such as African-Americans. (*People v. Salcido* (2008) 44 Cal.4th 93, 136 (*Salcido*).)

A defendant's *Wheeler* objection to the prosecutor's exercise of a peremptory challenge triggers a three-fold inquiry. First, the trial court must determine whether the defendant has made a prima facie case that the prosecutor exercised the challenge based on race. (*Lenix, supra,* 44 Cal.4th at p. 612; *Salcido, supra,* 44 Cal.4th at p. 136.)

Second, once a prima facie case has been made, the burden shifts to the prosecutor to demonstrate that he exercised the challenge for a race-neutral reason. (*Lenix, supra,* 44 Cal.4th at p. 612; *Salcido, supra*, 44 Cal.4th at p. 136.) The prosecutor must provide a clear and reasonably specific explanation of his legitimate reasons for the challenge. (*Lenix, supra,* at p. 613.) His reason may be trivial, so long as it is race neutral. (*People v. Arias* (1996) 13 Cal.4th 92, 136 (*Arias*).) Indeed, "[a] prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons. [Citation.]" (*Lenix, supra,* at p. 613; see *People v. Turner* (1994) 8 Cal.4th 137, 165.)

Third, once the prosecutor has provided a race-neutral explanation, the trial court must determine whether the defendant has proven deliberate racial discrimination. (*Lenix, supra,* 44 Cal.4th at p. 612; *Salcido, supra,* 44 Cal.4th at p. 136.) The trial court must make a "sincere and reasoned effort to evaluate the nondiscriminatory justifications offered . . . ." (*People v. Burgener* (2003) 29 Cal.4th 833, 864; see *People v. Hall* (1983) 35 Cal.3d 161, 167−168.) This evaluation involves the trial court's assessment of the credibility of the prosecutor's explanations. The court evaluates credibility based on

numerous factors, including how reasonable—or how improbable—the explanations are; whether the explanations are consistent with accepted trial strategy; and the prosecutor's demeanor. The court may also rely on its own experience as lawyer and judge, its knowledge of the common practices of the prosecutor in question and his office, and its contemporaneous observations of voir dire. (*Lenix, supra,* at p. 613.)

And while the burden shifts to the prosecutor at the second stage of the inquiry—to show that his exercise of the challenge was race neutral—"[t]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the [peremptory challenge]. [Citation.]" (*Lenix, supra,* at pp. 612−613.)

Our review of a trial court's denial of a *Wheeler* motion is deferential. (*Lenix, supra,* 44 Cal.4th at p. 613; *Salcido, supra,* 44 Cal.4th at p. 136.) We review a trial court's acceptance of a prosecutor's race-neutral explanations "with great restraint. The party seeking to justify a suspect excusal need only offer a genuine, reasonably specific, [race-neutral] explanation related to the particular case being tried. [Citations.]" (*Arias, supra,* 13 Cal.4th at p. 136.) We examine only substantial evidence that supports the trial court's determination that the explanations are in fact race neutral. (See *Lenix, supra,* at p. 613.) We presume the prosecutor has used his peremptory challenges in a constitutional manner, and accord great deference to the trial court's ability to separate the wheat of bona fide explanations from the chaff of discriminatory ones. (See *id.* at pp. 613−614.) So long as the trial court makes the necessary sincere and reasonable effort to evaluate the explanations, we will generally defer to its conclusions. (*Id.* at p. 614.)

Defendant's claim of *Wheeler* error arises from the prosecutor's exercise of his fourth peremptory challenge against Juror No. 19. Defendant contends the prosecutor's explanations for the challenge were not race neutral, and the trial court failed to make a sincere and reasoned effort to evaluate the explanations.

In his juror questionnaire, Juror No. 19 identified himself as a 20-year-old African-American electrician who was a high school graduate. He had been married for 17 months and had a seven-month-old child. He and his family lived with "friends or

relatives." For recreation, he enjoyed "family time" and watching sports. He "seldom or never" read a newspaper. His wife was a day care provider, his father a chef, and his mother a florist. Neither he nor any of his family members or close friends had ever been a suspect or a victim of a crime, or been the victim of physical or sexual assault or domestic violence. Juror No. 19 had never served on a jury, and had no opinions regarding defense lawyers or prosecutors.

In the death penalty portion of the questionnaire, Juror No. 19 indicated he had never had conversations with others regarding the death penalty. He responded to four specific death penalty questions as follows:

• Question No. 97: "What are your general feelings and beliefs regarding the death penalty?"

Answer: "It all depends on the extent of the crime."

• Question No. 98: "How would you rate your attitude towards the death penalty?"

Answer: "Don't know."

• Question No. 99: "Check the entry which best describes your feeling about the death penalty."

Answer: "Will consider/undecided/haven't thought about it."

• Question No. 100: "Have you ever had conversations with anyone regarding your beliefs on the death penalty?"

Answer: "No."

During voir dire, the prosecutor asked Juror No. 19 if he had "thought a lot about" the death penalty. Juror No. 19 answered, "Not really, no." After further questions, Juror No. 19 said he could impose the death penalty if it was supported by the evidence.

Defendant objected to the peremptory challenge of Juror No. 19 on *Wheeler* grounds. He argued he saw no reason for the challenge other than the fact that Juror No. 19 is African-American. The trial court found that defendant had satisfied the requirement of the first stage of *Wheeler*, i.e., had proved a prima facie case.

The prosecutor, who had previously remarked that Juror No. 19 looked "a little bit younger" than other jurors, explained the reasons for his peremptory challenge as follows:

"[Juror No. 19] is 20 years old. If you look at this panel, Judge, there are a lot of young people, so I had to be discriminating, at least to a certain extent, on where I draw the line on age.

"My difficulty with [Juror No. 19] is essentially twofold. One of them has to do with he's 20 years old. He's never been on a jury before. His parents—his dad's a chef. His mom works with flowers.

"The fact that he's 20 and hasn't formed an opinion concerns me. He said that he didn't know or didn't have an opinion about the death penalty. He did say that he could consider both options. He was very open about it.

"And unlike some of the other young people on this panel that basically fall into two categories—there's the young people that have some prior jury to look at, or some sort of tie to law enforcement, or some indication that they've given this thought—[Juror No. 19] very openly said he hadn't really thought about this much, hadn't formed an opinion. And to go into a death penalty case with somebody who's never been on a jury before, who's 20 years old, that hasn't really considered this issue is very concerning to me.

"People who are young that don't know could be the product of two things: They've never thought about it, or they have not spent time with their parents forming their or shaping their opinions. That type of juror, in my opinion, is susceptible to influence from both sides on the issue. And they could change their view at that young age based on what other jurors are doing.

"There are other young jurors who at least have given an indication that they support it and also, through their answers, gave an indication that they have thought about it prior to the questionnaire and reflected on it between the questionnaire and coming to court. So in that respect that was my concern with [Juror No. 19].

[¶] . . . [¶]

"[M]y concern primarily in a death penalty case has to do with somebody who's 20 years old and doesn't know a position on the death penalty and hasn't considered it up to this stage."

Defendant argued that age should be considered a "protected class" under *Wheeler*, and that a lack of jury service is not surprising in a person as young as 20 and is therefore irrelevant. Defendant also argued that Juror No. 19's indecision about the death penalty shouldn't disqualify him, noting that Juror No. 19 had at least indicated on his questionnaire that some crimes deserved the death penalty and that he "has an opinion about mitigation."

The trial court denied defendant's *Wheeler* motion: "The Court finds that the explanations given by [the prosecutor] are factually based and legally appropriate.

"Lack of life experience and a juror who has no prior thought of the death penalty I think are proper concerns of [the prosecutor], as well as [another reason for the peremptory challenge not relevant here]; although, I'd probably give more weight to the younger age of the juror, and here he is to make such a heavy decision with not having much of life experience as yet.

"So the Court finds that the explanation given by the prosecutor was the actual basis for the challenge, and the motion is denied."[9]

In light of our deferential standard of review, we conclude that the trial court properly determined that the prosecutor's race-neutral explanations of youth and lack of a position on the death penalty were credible.

Age is not a "protected class" under *Wheeler*. (*People v. Lewis* (2008) 43 Cal.4th 415, 482 (*Lewis*).) Rather, the limited life experience of the young has been held to be a race-neutral explanation for a peremptory challenge. (*People v. Sims* (1993) 5 Cal.4th 405, 429−430; *People v. Gonzales* (2008) 165 Cal.App.4th 620, 631; *People v. Perez*

[9] The prosecutor had also given other explanations, most of them minor, which we need not discuss. The prosecutor explained his peremptory challenge was primarily based on the factors of youth and lack of a position on the death penalty. These are the two factors on which the trial court focused.

(1994) 29 Cal.App.4th 1313, 1328.) The prosecutor could legitimately have believed that a 20-year-old man lacked sufficient maturity to remain attentive to the evidence in a capital case and render a meaningful judgment on the issue of penalty, literally one of life and death.

So too, the prosecutor could legitimately believe that a prospective juror who had given little thought to the death penalty, and had not formed an opinion thereon, was not a suitable member of the jury panel in a capital case. Although Juror No. 19 ultimately said he could vote for the death penalty if the evidence supported it, the prosecutor was entitled to view the juror askance given his distinct lack of attitudinal attention to the issue of the ultimate sanction. Under these circumstances, the prosecutor could reasonably conclude that Juror No. 19 might be reluctant to vote for the death penalty when the time came for that momentous decision. (See, e.g., *Lewis, supra,* 43 Cal.4th at p. 473 [juror excused who "could probably" impose the death penalty, but had expressed reservations about it]; *People v. McDermott* (2002) 28 Cal.4th 946, 977−978 [juror excused who saw "no difference" in severity of punishment of death vs. life in prison].)

We accept the trial court's determination that Juror No. 19's youth and lack of a position on the death penalty were race-neutral explanations for the peremptory challenge. We also conclude the record shows the trial court made the necessary sincere and reasoned effort to evaluate the explanations. Based on the proffered explanations and the trial court's determination, we see no *Wheeler* error.

Defendant invites us to find error based on comparative juror analysis. Generally speaking, such an analysis would involve comparing the explanations for excusing African-American prospective jurors with relevant characteristics of nonAfrican-American prospective jurors, especially those who were not excused. (See *Lenix, supra,* 44 Cal.4th at pp. 621−622.) Comparative juror analysis is "but one form of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination." (*Id.* at p. 622.) Our Supreme Court has strongly suggested that such analysis, standing alone, cannot be a basis for a finding of *Wheeler* error. (*Id.* at p. 626.) And comparative juror analysis does not dilute our deferential standard of

review, especially where—as here—such analysis is performed for the first time on appeal on a cold appellate record. (*Id.* at pp. 622−628.) In any case, a comparative analysis does not cast a shadow of doubt on the exercise of the peremptory challenge to Juror No. 19.

Youth. Other than Juror No. 19, there were five prospective jurors who were 26 or younger. Defendant concedes that the prosecutor exercised peremptory challenges against four of these five, leaving only Juror No. 42. This strongly suggests youth was a legitimate concern for the prosecutor in his approach to the composition of the jury panel. Indeed, three of the four young jurors excused by the prosecutor seemed inclined to *favor* the prosecution—they had positive views of police officers and favorable opinions of the death penalty. The fourth was similar to Juror No. 19 in that she had no opinion about the death penalty.

The race neutrality of the explanation of youth is further reinforced by examination of Juror No. 42. He appeared to be particularly favorable to the prosecution, in that he supported the death penalty, believed it was always appropriate in certain circumstances, had ties to law enforcement, and believed police officers were less likely to lie than other witnesses. It appears the factor of youth was trumped by the prospective juror's perceived favorability to the prosecution. Indeed, Juror No. 42 was excused by the defense.

Lack of Position on the Death Penalty. Defendant points to two jurors not challenged by the prosecutor, Juror No. 37 and Juror No. 170, and argues they had an attitude about the death penalty similar to Juror No. 19. Defendant concludes that given this comparative similarity, the explanation based on Juror No. 19's attitude toward the death penalty was a pretext for a peremptory challenge based on race.

This argument does not withstand scrutiny. While both jurors had written on their questionnaires that they did not know or had not thought about their attitudes toward the death penalty, both revealed a positive attitude toward the death penalty during voir dire. Juror No. 37 said she could impose the death penalty after weighing all the facts. Juror No. 170 said imposing the death penalty was "extremely serious," but she could impose

it. Moreover, both jurors exhibited characteristics which would have endeared them to the prosecution. Juror No. 37 was 63 and had worked for or with a number of law enforcement agencies. Her son was a sheriff's deputy. She had been the victim of domestic violence. Juror No. 170 was 47, described herself as politically conservative, and had been the victim of family sexual abuse when she was young.

We conclude that comparative juror analysis does not reveal evidence that the peremptory challenge of Juror No. 19 was based on race.

Defendant has not demonstrated *Wheeler* error.

B. Alleged Prosecutorial Misconduct

Defendant contends the prosecutor engaged in prejudicial misconduct during closing argument to the jury at the guilt phase of the trial. He concedes that any prejudice would not affect the felony-murder convictions, on which he admitted guilt before the jury, but argues that prejudicial misconduct goes to the issue of his intent to kill or cause harm, and thus would affect his convictions for mayhem, arson, and attempted voluntary manslaughter, as well as the kidnapping special circumstance.

Given defendant's admission in his testimony to the felony murder of the two children, the prosecutor's closing argument focused on the issue of defendant's intent to set the fire, as pertinent to the issue of his intent to kill or maim Weaver. The prosecutor noted that the evidence against defendant came from independent witnesses and scientific analysis. The prosecutor then compared the prosecution evidence with defendant's testimony: "You got to see the defendant testify. Now, I'm going to get to this a lot more in-depth later. But in prefatory comments, let me just say: *I submit to you that he got on that stand and lied to all of you on more than one occasion.*

"And you have to remember something. He's the one who's on trial here today. He's the one facing charges of murdering his two children, attempting to kill the mother of those children, aggravated mayhem on her. It's his fate you folks decide today. *He's got nothing to lose. Nothing. Nothing.* He's had four years to sit there and think about his testimony. He's had all these expensive experts to come in and, I guess, help. But he's had all this time." (Italics added.)

Defendant did not object to this argument.

During his argument, defense counsel admitted that defendant was guilty of the felony murders of Daelin and Devlin, as well as kidnapping and carjacking. But defense counsel argued the ignition of the gasoline was not intentional, so that defendant was not guilty of the attempted premeditated murder of Weaver, intentional arson, or aggravated mayhem.

At one point, defense counsel argued: "Now, as I say, the evidence is more than adequate to convict Mark Fregia of two murders. So I'm not gonna try and take you down some false path of critical reasoning in the hope that Mark Fregia is going to get walked out the door. He doesn't want that. He's never asked for that. We've never asked for it. *He should spend the rest of his life in prison.* [Italics added.]

"[PROSECUTOR]: Objection, your Honor. Improper argument. Goes to penalty or punishment.

"[THE COURT]: Yeah, that last phrase does."

Later in his argument, defense counsel responded to the prosecutor's "nothing to lose" argument: "So, how does the prosecutor handle this? Predictably, he calls Mark Fregia a liar. Mark's a liar. Lies repeatedly. Lies repeatedly. That's how the prosecutor handles that. That's what he says.

"*And he asserts to you in a serious tone of voice that Mark has nothing to lose. He has nothing to lose. He took the stand and lied because he has nothing to lose.* That's what the D.A. told you. [Italics added.]

"Well, we take a different view. *Mark Fregia, in our opinion, has everything to lose.* He knows, like we know, that if you believe him to be a liar, you will hold him in a negative light. He knows his fate is in your hands, and he knows that if you say he's a perjurer, that he's unbelievable, *that the eventual outcome for him could be death.* [Italics added.]

"[PROSECUTOR]: Objection, your Honor; this is completely inappropriate.

"[THE COURT]: That last statement was inappropriate at this juncture, and that will be stricken. Ladies and gentlemen [of the jury], you're not to consider that last statement, please." [Italics added.]

In his rebuttal, the prosecutor asked the jurors to ignore the issue of punishment: "Now, see I'm not gonna stand here and impugn the integrity of officers of the court or the defense attorneys. I'm not going to. See, the issue here is not the attorneys involved because they've got a difficult task, and there's a lot more going on here. You can tell from [defense counsel's] whole argument, this case, what they talk about has nothing to do with the guilt phase. *That's why [defense counsel] several times inappropriately brought up penalty, which you can't consider. That's why he did it. He's into talking to you about penalty."* [Italics added.]

Defendant did not object to this argument.

Defendant now contends the prosecutor committed misconduct in two ways. He claims the "nothing to lose" argument amounted to knowingly arguing a false inference to the jury, and that the prosecutor improperly denigrated defense counsel by arguing that the latter's references to penalty were improper.

These arguments have not been preserved for appeal, because the challenged prosecutorial arguments were not objected to. (See *People v. Hill* (1998) 17 Cal.4th 800, 820.) There is no indication that an objection or admonition would have been futile. (See *id.* at pp. 820−821.)

In any case, the arguments lack merit. While a prosecutor may not knowingly argue a false inference to the jury (see, e.g., *People v. Bittaker* (1989) 48 Cal.3d 1046, 1104−1105), we fail to see how a prosecutor argues a false inference by proposing that a defendant facing execution might fabricate or dissemble to avoid that ultimate sanction. Under the circumstances of this case, defendant indeed had "nothing to lose"—and his life, albeit forever in prison, to gain—by using fiction to paint himself and his story in the best possible light. It was not improper argument to point that out to the jury. Defendant's credibility was squarely in issue. (See, e.g., *People v. Rundle* (2008) 43

Cal.4th 76, 163, disapproved on unrelated grounds *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Likewise, it did not denigrate defense counsel to point out that his references to penalty were improper. Penalty is generally irrelevant to the issue of guilt. (*People v. Allen* (1973) 29 Cal.App.3d 932, 936−937.) It was proper comment, and certainly not impermissible denigration, for the prosecutor to note defense counsel's improper references to penalty. Impermissible denigration of opposing counsel is of a far greater magnitude than the challenged argument in this case. (See, e.g., *People v. Huggins* (2006) 38 Cal.4th 175, 207; *People v. Bell* (1989) 49 Cal.3d 502, 538.)

We find no prosecutorial misconduct in closing argument.[10]

III. DISPOSITION

The judgment of conviction is affirmed.

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Marchiano, P.J.

We concur:

_____
Margulies, J.

_____
Dondero, J.

[10] Defendant also challenges prosecutorial argument which asked the jurors to, in essence, put themselves in the position of Weaver and the two children and imagine their suffering. Defendant claims this was an impermissible appeal to the passion and prejudice of the jury. Any error was harmless in light of the overwhelming evidence. Arguments of this nature have been repeatedly found to be not prejudicial. (See, e.g., *People v. Stansbury* (1993) 4 Cal.4th 1017, 1057, reversed on other grounds *Stansbury v. California* (1994) 511 U.S. 318; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1250−1251; *People v. Fields* (1983) 35 Cal.3d 329, 362−363.)